COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Proceeding by the Department	)	
of Telecommunications and Energy	)	
on its own Motion to Implement the	)	
Requirements of the Federal Communications	)	D.T.E. 03-59
Commission's Triennial Review Order	)	
Regarding Switching for Large Business	)	
Customers Served by High-Capacity Loops	)	

OPPOSITION OF DSCI AND INFOHIGHWAY TO
VERIZON MOTION FOR PARTIAL RECONSIDERATION

INTRODUCTION

DSCI Corporation ("DSCI") and InfoHighway Communications Corporation ("InfoHighway") (collectively, the "Carriers") oppose Verizon's February 12, 2004, motion for partial reconsideration ("Verizon Motion") of the Department's January 23, 2004 Order (the "Order"). The Order had denied the Carriers' earlier motion for clarification and reconsideration of the earlier November 25, 2003 Order closing the instant proceeding (the "Docket Closing Order").

In the Order, the Department declined to adopt the Carriers' argument that challenges to rates, terms and conditions of network elements no longer required to be listed under 47 U.S.C. § 251, such as enterprise switching, could be reviewed by the Department in connection with an arbitration under 47 U.S.C. § 252 as well as reviewed by the Federal Communications Commission ("FCC") under 47 U.S.C. § 271.[1] Verizon

[1] The Carriers note their continued disagreement with the Department's interpretation of applicable law, as reflected in both the Docket Closing Order and the Order, but they will not re-argue these points herein.

now seeks to turn this favorable ruling on a narrow point into a broad finding that Verizon is exempted from longstanding statutory requirements to file wholesale tariffs.[2] This extraordinary attempt to deprive the Department of authority over a jurisdictionally intrastate service conflicts with the Department's reconsideration standards and with applicable law, and must be denied.

ARGUMENT

Verizon simply has not and cannot meet the Department's well settled reconsideration standards.[3] Verizon's reconsideration motion is not based on Department inadvertence or other circumstances that warrant Department modification of its earlier decision. Verizon, as a Massachusetts common carrier, is statutorily obligated to submit tariffs showing "all rates…for any service, of every kind rendered or furnished or to be rendered or furnished, by it within the commonwealth, and all conditions and limitations, rules and regulations and forms of contracts or agreements in any manner affecting same," in such format prescribed by the Department.[4] Verizon also is required to provide 30 days advance public notice of proposed changes in rates, terms and conditions and the Department may, upon complaint or upon its own motion, initiate

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2 See Order at p. 8 n. 9.

3 A motion for reconsideration "should bring to light previously unknown or undisclosed facts that would have a significant impact upon the decision already rendered" and "should not attempt to reargue issues considered and decided in the main case." Order on Motion of Verizon for Reconsideration and Clarification, et al., Investigation as to the Propriety of Rates and Charges Set Forth in M.D.T.E. Nos. 14 and 17, DTE 98-57 – Phase I (May 21, 2001) at 14 (internal citations omitted). A reconsideration motion also "may be based on the argument that the Department's treatment of an issue was the result of mistake or inadvertence." Id. None of these grounds is present here.

4 G.L. c. 159, § 19; see also G.L. c. 159, § 12 (subjecting telephone companies to Department jurisdiction).

an investigation and either suspend such propose changes or allow them to take effect.[5] If Verizon were going to argue that the Department's longstanding statutory authority over the rates, terms and conditions of Massachusetts common carriers and associated tariffing obligations would be eliminated in the event that the Department agreed with its arguments that challenges to Section 251 de-listed elements should be brought to the FCC, it should have done so expressly in its earlier filings or otherwise seek a ruling in the Department. Indeed, the Department in its November 25 decision in this docket stated its view on state law pricing policy applicable to enterprise switching.[6] Verizon cannot properly make arguments regarding the interplay between federal and state substantive and procedural requirements for the first time upon reconsideration at the close of the case.[7]

Furthermore, Verizon's unsubstantiated claim that it would be "anomalous" to continue to hold Verizon to tariffing requirements in light of the findings in the Docket Closing Order (Verizon Motion at 3) is not accurate or reasonable, for multiple reasons. First, the statutory requirement that tariffs be filed by Massachusetts common carriers and subject to investigation cannot be ignored by the Department.[8] Second, the tariffs

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5 G.L. c. 159, §§ 19-20; see also G.L. c. 159, § 13-14 (authorizing Department investigations into common carrier rates, changes and practices, including whether rates are "unjust, unreasonable, unjustly discriminatory, unduly preferential" or otherwise unlawful).

6 See Docket Closing Order at 18-20 (discussing Verizon Alternative Regulation, D.T.E. 01-31 Phase I (2002)).

7 The comparison between the specific obligations imposed on common carriers in G.L. c. 159 and the allegedly "analogous" situation involving wholesale generation of electricity, devoid of supporting citations, to the very different applicable legal, technical and policy issues raised by electricity generation under different federal and state statutes (Verizon Motion at 3), is not apt.

8 The issue of whether the Department would have statutory authority to modify tariffing requirements for certain common carriers, such as non-dominant CLECs, should be reserved for an appropriate proceeding.

play an important informational role for the Department, competitive local exchange carriers, the Attorney General and the public, as they allow such parties advanced notice of proposed changes and the opportunity to present concerns to Verizon, the Department or, if necessary and appropriate, the FCC. Third, Verizon is subject to substantial obligations under state law, including the obligation to avoid "unjust, unreasonable, unjustly discriminatory, unduly preferential" or otherwise illegal rates.[9] Verizon also may be subject to continuing switching-related obligations under other Department decisions designed to assure quality service and protect competition, such as carrier-to-carrier guidelines or the performance assurance plan. The Department cannot and should not risk impliedly voiding any such obligations without investigation or full consideration.

[9] G.L. c. 159, § 13-14.

CONCLUSION

For the reasons stated above, the Department should deny Verizon's motion for partial reconsideration of the Department's January 23, 2004 Order.

Respectfully submitted,

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DSCI and INFOHIGHWAY

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